BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of *Computer III* Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services	CC Docket No. 95-20
1998 Biennial Regulatory Review -- Review of *Computer III* and ONA Safeguards and Requirements	CC Docket No. 98-10

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California ("California") hereby respectfully submit these comments in the Further Notice of Proposed Rulemaking ("Further Notice") in the above-captioned docket. Among other things, the Federal Communications Commission ("FCC") seeks comment on whether it is in the public interest for the FCC to extend to pure information service providers ("ISPs") the unbundling provisions of Section 251 of the Telecommunications Act of 1996 ("1996 Act") applicable to telecommunications carriers. As more fully discussed below, pure ISPs, which are unregulated carriers, should not be entitled to the rights conferred by Section 251

on regulated telecommunications carriers unless such ISPs assume all of the responsibilities borne by telecommunications carriers.

I. BACKGROUND

In its Further Notice, the FCC points out that Section 251 of the 1996 Act requires incumbent local exchange companies to provide interconnection and access to unbundled network elements ("UNEs") to telecommunications carriers. The purpose of Section 251 is to enable telecommunications carriers to interconnect to the local network in order to provide local exchange services in competition with the incumbent local exchange companies. Telecommunications carriers are common carriers under federal law and public utilities under California law, and currently are subject to federal and state regulation as such, respectively.

Under the FCC's Computer III regime, incumbent local exchange carriers are required under Open Network Architecture ("ONA") to give ISPs access to services used in the provision of information services. Pure ISPs (i.e., ISPs which provide only information services) are not common carriers, and are not subject to federal regulation under Title II of the Communications Act of 1934.

As the FCC observes, the unbundling mandated by Section 251 for telecommunications carriers and the unbundling mandated by ONA differ. Unbundling under Section 251 includes the physical facilities of the network, together with the features, functions, and capabilities associated with those facilities, and allows for the substitution of underlying facilities in a carrier's

network. Section 251 also requires incumbent local exchange carriers to provide for collocation at the local exchange carriers' premises. In contrast, unbundling under ONA unbundles network elements only to the extent necessary to allow ISPs to provide enhanced services on the same terms and conditions as the local exchange carriers. ONA unbundling does not mandate interconnection on carriers' premises of facilities owned by others. And unlike Section 251 unbundling, unbundling under ONA would not feasibly allow ISPs to offer local exchange services.

The two different types of unbundling under Section 251 and ONA serve distinct purposes in two distinct market segments. Unbundling under ONA has permitted the information services market to remain competitive, and hence largely unregulated. In contrast, unbundling under Section 251 is designed to spur competition in the local exchange market which currently remains dominated by a few major players with substantial market power, and thus continues to be regulated.

Against this backdrop, and as discussed below, neither the purpose of the 1996 Act nor public policy supports the extension of Section 251 unbundling to pure ISPs.

II. ARGUMENT

Under the 1996 Act, Congress sought to foster competition in the local exchange market by requiring local exchange carriers to extensively unbundle their

networks to enable competing telecommunications carriers to interconnect and access features and functions used to provide local exchange services. Like local exchange carriers, telecommunications carriers are common carriers, and subject to regulation by the FCC under Title II of the Communications Act of 1934, and by the states under applicable state law. Thus, while telecommunications carriers enjoy the rights afforded by Section 251 interconnection, they also must bear the responsibilities of a regulated common carrier.

In California, telecommunications carriers are regulated public utilities, and as such, must obtain certification or registration from the California Commission prior to providing service. Telecommunications carriers are also responsible for the collection and remittance of regulatory surcharges in support of California's Universal Service Programs, such as Lifeline, the High Cost Fund, and Schools and Libraries. Such carriers bear similar responsibilities under federal law. In addition, telecommunications carriers are subject to the California's Commission's consumer safeguard regulations applicable to all competitive local carriers' intrastate operations. Such carriers must agree to abide by these and other rules before obtaining certification to operate.

In contrast, ISPs are immune from such regulation in California. They are neither certified nor registered by the California Commission. ISPs also are not required to fund state assistance programs, nor are they required to abide by the

California Commission's consumer protection regulations applicable to telecommunications carriers. Under federal law, ISPs are completely deregulated.

By extending the rights of Section 251 interconnection to pure ISPs, pure ISPs would immediately be able to provide local exchange services in competition with incumbent and other local exchange carriers without assuming any of the responsibilities borne by these latter carriers. ISPs would essentially be unregulated common carriers with the ability to circumvent any or all of the obligations imposed on common carriers to further the public interest. In addition, those carriers which are certified and regulated would have the incentive to become decertified and to operate under the FCC's classification as unregulated ISPs. In short, the purpose of the 1996 Act would be turned on its head, resulting in de facto deregulation of the local exchange market that Congress intended to remain regulated until fully competitive. Indeed, if ONA unbundling had been adequate to open local exchange services to competition, there would have been no need for the further unbundling requirements of Section 251.

To be sure, Congress balanced the interests of incumbent local exchange carriers, competitive local exchange carriers (or telecommunications carriers), and ISPs under the 1996 Act. In particular, Congress carefully defined a telecommunications carrier to mean a common carrier subject to Title II of the Communications Act of 1934, and was necessarily cognizant that ISPs were not subject to Title II. By extending the rights of interconnection set forth in Section

251 to telecommunications carriers, and not to ISPs, Congress primarily sought to spur competition in the incumbent's local exchange market (as opposed to the information services market) by other entities subject to similar (although not identical) rights and responsibilities as the incumbent local exchange carriers. At the same time, Congress granted the ISPs significant protection from unfair competition from the incumbent local exchange carriers in the information services market by requiring the latter carriers to offer interLATA telemessaging services and electronic publishing services through a structurally separate subsidiary under Sections 272 and 274 of the Act.

The careful balance that Congress struck among incumbent local exchange carriers, competitive telecommunications carriers, and ISPs in crafting the 1996 Act would be completely undermined if ISPs were extended the rights afforded to other carriers without any of the obligations that attach to those rights.

This is not to say that ISPs cannot enjoy the benefits of Section 251 interconnection. They can by entering into partnering or teaming arrangements with telecommunications carriers that have interconnection rights under Section 251. ISPs can also obtain certification as telecommunications service providers in order to receive access to Section 251-type UNEs. California believes that both of these options are feasible.

In sum, based on all of the above, there is no compelling reason either in law or policy for extending Section 251 unbundling to benefit pure ISPs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 26th day of March, 1998, a true and correct copy of the foregoing COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA was mailed first class, postage prepaid to all known parties of record.

Ellen S. LeVine